IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.3407 OF 2004

Shri.Narayan Kondiba Papal
alias Shirke ...Petitioner

Vs.

Shri.Kondiba Rama Papal
alias Shirke and Ors. ...Respondents

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Mr.V.D.Borwankar and Aniruddha Pratinidhi for Petitioner
Mr.A.V.Anturkar for Respondent Nos. 2,3(a),3(b),3(c) & 3(d)
Mr.R.S.Kate for Respondent No.4

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CORAM : B.H.MARLAPALLE,J.
DATE : APRIL 5,2005

P.C.:

1. Heard Mr.Pratinidhi, the learned counsel for the Petitioner, Mr.Anturkar for Respondents Nos. 2, 3(a) to 3(d), and Mr.Rahul Kate for Respondent No.4.

2. Rule. Respondents waive service of notice of Rule.

3. The petition is taken up for final hearing forthwith as the issue involved for determination is very limited.

4. The Petitioner has filed R.C.S.No. 100 of 1966

for partition and possession of the property of his adopted father Shri.Kondiba Rama Papal. His status as an adopted son, has been judicially accepted and the same has been confirmed by the Supreme Court as well way back in 1991. However, the trial Court did not receive the Record and Proceedings till the year 2002 and on receipt of the same, the suit was taken up for trial.

5. In the said suit, an application for amendment came to be filed by the Plaintiff on or about 26.3.2004 and the same application has been marked as Exh.176. The Plaintiff prayed for amendments under Order VI Rule 17 of C.P.C. which was opposed by the defendants by filing say. The trial Court by its order dated 2.4.2004 was pleased to reject the said application and hence, this petition.

6. The original defendants nos. 1 and 2 are adopted parents of the Petitioner-Plaintiff and on the demise of the Respondent no.1 i.e. Shri.Kondiba Rama Papal the adopting father, only two legal heirs survived i.e. Respondent No.2 and the Petitioner. The Respondent No.3 purchased the joint family property of the Petitioner and Defendants from late Kondiba and therefore, he also came to be impleaded as defendant no.3 and on his demise, his legal representatives came on record and they are impleaded

as Respondent nos. 3(a) to 3(d) in the present petition. The Respondent no.4 purchased some immovable property from the defendants by a sale deed dated 2.3.1991 and it is the contention of the plaintiff that the said sale was illegal and it was during the minority of the petitioner. He has therefore, challenged the validity of the same by seeking amendment to the plaint. By the proposed amendments the plaintiff sought to add clauses 2(B), 3(A), 4(A), 6(A) and 6(B). The reasoning given by the trial Court in refusing to allow the proposed amendments in terms of the additions to the plaint in clauses 2(B), 3(A) and 4(A) do not call for any interference but at the same time, there is no justification in straightway rejecting the proposed additions in terms of prayer clauses 6(A) and 6(B). The said proposed additions have been rejected solely on the grounds of limitation inasmuch as the conveyance of the property in favour of respondent no.4 is dated 2.3.1991 and the amendment application was submitted after more than 12 years from the same date i.e. on 26.3.2004. The learned counsel for the petitioner placed reliance on the decision in the case of *Ragu Tilak D.John Vs. S.Rayappan and others [2001(2) SCC 472].* It has been held that in an application under Order VI Rule 7 of the C.P.C. seeking amendments to the plaint if the relief sought for is barred by limitation, that itself would not be

a reason to reject the amendment and the Court has powers to frame an issue regarding limitation which could be decided by adducing evidence. The amendment on the ground of limitation need not be rejected per-se.

. Mr.Kate, the learned counsel for the respondent no.4 on the other hand, has placed reliance on the decision in the case of *T.N.Alloy Foundary Company Ltd. Vs. T.N.Electricity Board and others [2004(3) S.C.C. 392].* It has been held that the trial Court would, as a rule, decline to allow the amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. A further caveat has been placed by saying that it is a factor taken into account in exercise of discretion as to whether the amendments should be ordered and whether it affects the power of the Court. The view that the trial Court even allows the amendment application, it still retains within the power of framing the issue of limitation while considering the amended relief and if the limitation issue is answered against the plaintiff, the added relief cannot be considered and the plaintiff will be ousted to that extent.

7. By following the law laid down by the Apex Court, it is clear that in the instant case the amendments proposed in terms of clauses 6(A) and (B) are

required to be allowed and the trial Court will have to frame an additional issue as to whether these amended reliefs are hit by limitation. Such an issue will have to be considered and decided on the basis of the evidence that would be adduced by the respective parties.

8. Hence, the petition succeeds partly and the impugned order to the extent of declining the prayer to add prayer clauses 6(A) and (B) is hereby set aside. The amendment application at Exh.176 is hereby allowed partly and the plaintiff is permitted to amend the plaint by the additions of para 6(A) and (B) and the consequent para in terms of prayer clause. However, the trial Court will have to frame an additional issue regarding limitation in respect of these added averments and it will have to be decided on the basis of the evidence, the parties may adduce.

9. Rule is made absolute accordingly with no order as to costs.

[B.H.MARLAPALLE,J.]